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No. 90-577

In The

Supreme Court of the United States

October Term, 1990

CONFEDERATED TRIBES AND
BANDS OF THE YAKIMA NATION,

Cross-Petitioner,

v.

COUNTY OF YAKIMA and DALE A. GRAY,
YAKIMA COUNTY TREASURER,

Cross-Respondents.

**On Cross-Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF CROSS-RESPONDENT IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Cross-respondent Yakima County opposes the Cross-petition of the Yakima Indian Tribe herein. The Cross-petition, received by Cross-respondents on October 5, 1990, asks for review of this case to decide whether the authority of the states, according to Section 6 of the General Allotment Act, to tax Indian lands patented in fee under the Act, still

continues or rather is impliedly repealed by the Indian Reorganization Act of 1934 and "other Congressional legislation which repudiated the Allotment Acts and the assimilation policies behind them." Such "other" repudiating legislation is never identified in the Cross-petition, and Yakima County asks that this Court, in any event, not grant certiorari in reliance thereon.

Contrary to the assertion of the Cross-petition, at p. 6, n.4, the trust periods for Indian allotments out of the Yakima Reservation were not extended beyond 1945. 25 C.F.R. Appendix, Chapter I, 4-1-90 Ed. at p. 749.

SUMMARY OF ARGUMENT

The Tribe's Cross-petition alleges three grounds for the granting of its requested writ; namely: that the Court of Appeals decision in this case (1) conflicts with an Arizona Supreme Court decision, (2) conflicts with applicable decisions of this Court, and (3) raises an important question of law that calls for resolution by this Court. The Tribe's Cross-petition implicitly concedes the assertion in the County's Petition that *Brendale v. Confederated Tribes*, 109 S.Ct. 2994 (1989) has no proper application to this case. Cross-pet., p. 9. Cross-respondent Yakima County responds that: (1) The 1981 Arizona case relied on by the Tribe is factually distinct from ours, did not involve the statute at issue herein (25 U.S.C. 349) and presents no real conflict; (2) the applicable decisions of this Court are consistent with and indeed support the Court of Appeals' conclusion that states still have the same taxing authority granted to them by Congress in the General Allotment Act; and (3) the survival, since 1934, of the legal incidents of land transfers made under the General allotment

Act is no longer (if it ever was) a question requiring this Court's attention. Yakima County agrees with the Cross-petitioner's observation that *Brendale* provides no proper basis for resolution of this case and therefore asks for summary reversal of the Court of Appeals' remand for fact-finding under *Brendale*.

REASONS WHY THE CROSS-PETITION SHOULD BE DENIED

The Tribe's Cross-petition places great reliance on a supposed conflict between the Court of Appeals decision in this case and the 1981 decision in *Battese v. Apache County*, 630 P.2d 1027 (1981), by the Arizona Supreme Court. The reason for the result in *Battese* is the lack of Congressional consent to state taxation of lands such as those of the plaintiffs Battese. The Arizona Supreme Court decided *Battese* on the basis of the principal taken from *McClanahan v. Arizona Tax Comm.*, 411 U.S. 164 (1973), *Mescalero Apache v. Jones*, 411 U.S. 145, and *Moe v. Salish & Kootenai Tribes*, and excerpted therefrom by the Arizona Court as follows:

> [I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation *lands* or Indian income from activities carried on *within the boundaries of the reservation*, and *McClanahan v. Arizona State Tax Commission, supra*, lays to rest any doubt in this respect holding that such taxation is not permissible absent congressional consent. [citation's] (emphasis added). 630 P.2d 1029.

Thus, the dispositive question in *Battese*, as well as the instant case, is whether Congress has consented to the taxation of the property in issue. Because of the particular title history of *Battese* properties, 25 U.S.C. 349 did not apply to the *Battese* case. However, as the record reflects, the properties in this case are all within the purview of Section 349 which contains Congress' express consent to the taxes at issue here. Section 349 applies to property patented by the United States to individual Indians under the General Allotment Act. *Battese*, on the other hand, concerned lands patented by the United States to a *non-Indian* under *homestead legislation* not specified in the Arizona Court's opinion, which lands were annexed to the Navajo Reservation after the homestead claim thereto was filed. The conclusion of the Arizona Court was apparently premised on the peculiar title history of the Battese properties. However, lands patented to individual Indians according to the General Allotment Act are an entirely different matter, governed by 25 U.S.C. 349, and the conflict between the Arizona and federal Court of Appeals decisions posited in the Tribe's Cross-petition is non-existent.

The Tribe's Cross-petition cites three Indian taxation cases from this Court as in conflict with the Court of Appeals' decision in this case: *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); and *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973).

The *Moe* decision was very simply this Court's refusal to infer state authority to tax Indian *personalty* from the express statutory power (based on 25 U.S.C. 349) to tax Indian *realty*. This Court's reluctance to recognize a

power not expressly given in the statute was based in part on the intervening Indian Reorganization Act (25 U.S.C. 461, *et seq.*) which was deemed a repudiation of the policy which animated Congress in adopting Sec. 349 and granting the states power to tax the realty. There is no conflict between denial of an implied power to tax personalty and recognition of an express power to tax realty.

Mescalero involved a state sales tax on off-reservation tribal retail sales and a compensating use tax on the Tribe's purchase and use of ski lift equipment installed as fixtures on land leased by the Tribe from the U.S. Forest Service, the land having been expressly exempted by Congress from state property taxes. The sales tax was upheld up by this Court and the compensating use tax struck down. The reasoning of the Court was that the taxable (or exempt) character of fixtures on land should follow the taxable (or exempt) character of the land itself. The fixtures and their use were exempt *because* the land itself was exempt under 25 U.S.C. 465. 411 U.S. 158. The question now before the Court, whether subject lands are *themselves* taxable, is answered in our context by 25 U.S.C. 349 rather than by 25 U.S.C. 465. Just as the Yakima Tribe attempts to do in this case, the Apache Tribe in *Mescalero* attempted to establish a per se rule of Indian tax exemption which the Court rejected at 411 U.S. 147, 148, saying that generalizations as to tax exemptions for Indian enterprises are "particularly treacherous." This observation is especially apt for the present case. The one generalization the Court was willing to make about taxation of Indians and their property, however, is perfectly consistent with the Washington State taxes at issue here:

> [I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. State Tax Commission of Arizona, supra,* lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent. 411 U.S. 148 (emphasis added).

The difference between *Mescalero* and the present case, of course, is that 25 U.S.C. 349 does contain congressional consent for the property taxes challenged here. Therefore there is no conflict between *Mescalero* and the Court of Appeals decision in this case insofar as it upheld the validity of Section 349. As indicated by the foregoing passage, the rule of *McClanahan* is the same as that in *Mescalero*. State taxes imposed on Indians inside their respective reservations require the consent of Congress, clearly expressed. Since the consent of Congress to the taxation of Indian fee lands patented under the General Allotment Act has been clearly expressed in 25 U.S.C. 349, there is no conflict, as claimed by the Yakima Tribe, between the *McClanahan* and the Court of Appeals decision upholding Section 349.

The Tribe's Cross-petition relies on *DeCoteau v. District Court*, 420 U.S. 425 (1975) and *California v. Cabazon Band of Indians*, 480 U.S. 202 (1987) for the sweeping proposition that since Indian fee lands, as well as trust and restricted lands, within the limits of a federal Indian reservation are "Indian country", as defined in 18 U.S.C.

1151, they are *therefore* exempt from tax.[1] Neither *DeCoteau* nor *Cabazon* involved an express grant of Congressional authority for state action such as 25 U.S.C. 349. In these two cases, the Court apparently resorted to the criminal law definition of "Indian country" for help in resolving civil questions due to the absence of expressly controlling civil statutes. 25 U.S.C. 349, of course, makes such a resort to the criminal law unnecessary and inappropriate for the instant case.

The Tribe's Cross-petition, at page 9, points out the error of the Court of Appeals in applying *Montana* and *Brendale* to this case, saying "Neither *Montana* nor *Brendale* concerns the extent of state jurisdiction over Indians on reservation fee lands." On this point, the parties agree. It would therefore be appropriate and expedient for this Court to summarily reverse the Court of Appeals, as the portion of its decision herein which relies on *Brendale* and remand for judgment on the ad valorem taxes consistent with the balance of the Court of Appeals decision.

The substance of the Tribe's contention based on *Moe*, *Mescalero* and *McClanahan* is that the Indian Reorganization Act repealed the General Allotment, at least in part, and abrogated the consent to state taxation of Indian fee

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[1] According to 18 U.S.C. 1151(a), "Indian Country" includes *all* land within the limits of a United States Indian reservation. If state taxes do not apply to land in "Indian country" even *non-Indian* lands inside the reservation are exempt from state taxes. Yakima County submits that this reveals the spuriousness of the Tribe's "Indian country" theory.

lands patented under its authority.[2] This contention has been discussed at least twice by this Court since *McClanahan, Mescalero* and *Moe*. In *Montana v. United States*, 450 U.S. 544 at page 559, n. 9. The Court said:

> "The policy of allotment and sale of surplus reservation land was, of course, repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, at 25 U.S.C. Section 461 *et seq*. But what is relevant is this case is the effect of the land allocation occasioned by that policy on Indian treaty rights tied to use and occupation of reservation land."

More recently in *Brendale v. Confederated Tribes*, ___ U.S. ___, 109 S.Ct. 2994, at 3004, Justice White, writing for a plurality of this Court said:

> The Yakima Nation argues that we should not consider the Allotment Act because it was repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984. But the Court in *Montana* was well aware of the change in Indian policy engendered by the Indian Reorganization Act and concluded that this fact was irrelevant. (citation) Although the Indian Reorganization Act may have ended the allotment of further lands, it did not restore to the Indians the exclusive use of those lands that had already been passed to non-Indians or prevent already allotted lands for which fee patents were subsequently issued from thereafter passing to non-Indians.

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[2] The Tribe's position on Section 349 is thus at odds with that taken by the United States as amicus curiae on request for rehearing below. The United States, in its brief supporting rehearing, contends that Section 349 never constituted consent to state taxation of Indian fee lands.

At 109 S.Ct. 3011, Justice Stevens, in his minority opinion, referring to the Allotment Act by its sponsor's name, the Dawes Act, said:

> [T]he Dawes Act was designed ultimately to abolish Indian reservations while attempting to bring "security and civilization to the Indian". (citation) But not long after the Act took effect it became apparent that its beneficent purpose had failed and, in 1934, the Indian Reorganization Act, 48 Stat. 984, repudiated the allotment policy. (citation) In the interim, however, large portions of reservation lands were conveyed to non-members such as petitioners Wilkinson and Brendale.
>
> The Dawes Act did not itself transfer any regulatory power from the Tribe to any state or local governmental authority. (citations) Nonetheless, by providing for the allotment and ultimate alienation of reservation land, the Act in some respects diminished tribal authority. As we recognized in *Montana v. United States*, "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands."

This Court has already made clear, in the foregoing passages, that the Indian Reorganization Act, though it repudiated the assimilation policy on which the General Allotment Act was based, did not abrogate the legal effects of land allotments and patents made under the authority of the Allotment Act. A thorough examination has been made, on behalf of the Cross-respondent, of the legislative history of the Indian Reorganization Act, and nothing is found to indicate an intention of Congress in adopting the Act to change or abrogate the tax consequences, according to 25 U.S.C. 349, of the issuance of a

fee patent. Indeed, where the general subject of taxes on Indian lands is mentioned in the legislative history, it is clear that Congress understood Indian reservation lands to be tax exempt *so long as they continued to be held in trust*, and *taxable thereafter*. For example, see the remarks of Congressman Hastings of Oklahoma, and Cherokee Indian, at 78 Cong. Rec. 9268-9, May 22, 1934. The Cross-petition now asks the Court to consider the partial implied repeal of the General Allotment Act yet another time. Cross-respondent Yakima County submits that there is no longer any practical purpose to such a review.

CONCLUSION

For the foregoing reasons, the Cross-petition of Yakima Indian Nation herein should be denied and the decision of the Court of Appeals, insofar as it applies *Brendale v. Confederated Tribes* to this case, should be corrected.

Respectfully submitted,

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